IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

WEDNESDAY, THE 24TH OCTOBER 2007 / 2ND KARTHIKA 1929

FAO.No. 112 of 2006()

AGAINST THE ORDER DATED 17/12/2004 IN IA.1521,1522,1523/04 IN OS.43/2004 of PRINCIPAL SUB COURT,KOCHI

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APPELLANT/PETITIONER/1ST DEFENDANTS:

SHAJAN, AGED 28 YEARS,
S/O. GEORGE, KAPPITHANAPARAMBIL HOUSE,
ELAMKUNNAPUZHA P.O., VYPIN, ERNAKULAM.

BY ADV. SRI.A.X.VARGHESE

RESPONDENTS: PLAINTIFF:

KUNJAPPAN, AGED 54, S/O. MYLANKUTTY,
NIKATHITHARA HOUSE, NAYARAMBALAM P.O.,
NAYARAMBALAM VILLAGE, KOCHI TALUK.

BY ADV. SRI.S.B.PREMACHANDRA PRABHU

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 5/10/2007, THE COURT ON 24-10-2007, DELIVERED THE FOLLOWING:

ORDER ON I.A.NO. 1347/07 IN I.A.1318/2006 IN FAO 112/2006

DISMISSED.

SD/- P.R.RAMAN, JUDGE.
SD/- V.K.MOHANAN, JUDGE.

.//TRUE COPY//

P.R.RAMAN & V.K.MOHANAN,JJ.

C.M.APPL.NO.580/2006 &
F.A.O.No.112 of 2006

Dated this the 24th day of October, 2007.

JUDGMENT

Mohanan, J.

The appellant, who is the Ist defendant in O.S.No.43 of 2004 on the file of the Principal Subordinate Judge's Court, Kochi, preferred this appeal challenging the common order dated 17-12-2004 in I.A.Nos.1521/2004, 1522/2004 and 1523 of 2004 in the above suit. Those I.As are preferred by the appellant to receive the written statement, to condone the delay in filing a petition, which is the 3rd petition, for setting the ex parte decree dated 7-7-2004. By the impugned order, the court below has dismissed all the above petitions and aggrieved by the same, the appellant-petitioner approached this court with the above appeal.

2. While filing the present appeal, there is a delay of 431 days. Hence, along with the appeal, C.M.Application No.580/2006 was also filed for condonation of the delay. Besides, the above application for condonation of delay, the appellant has filed another petition, i.e. I.A.1318/2006 with a prayer to stay all proceedings in O.S.43/2004 of the Sub Court, Kochi. On 6-6-2006, notice was ordered in the above delay condonation petition. On receiving

notice, the respondent/plaintiff entered appearance and filed a detailed counter affidavit opposing the prayer to condone the delay. As per the proceedings it appears that on 28-7-2006, the lower court records was called for and the same was received on 17-1-2006 and on 25-1-2007, an interim order was passed in I.A. 1318/2006 to the effect that the delivery will be deferred for a period of 2 weeks, and seen an order calling for the entire suit records through a messenger. Thereafter the interim order extended from time to time and as per order dated 10-4-2007, in the stay petition, the interim order revived and extended by two months, thus the interim order continues. In the meanwhile, a reply affidavit was filed denying all the allegations contained in the counter affidavit filed by the respondent herein. Thus, the delay condonation petition as well as the stay petition came up for consideration and the same being considered together. Since the delay is comparatively for a long period, we are inclined to consider the merits of the appeal as well.

3. The appellant/defendant is the petitioner in the above mentioned interlocutory applications in the trial court. The suit was filed by the respondent herein for a decree for specific performance

of an agreement dated 25-8-2003 for sale of the petitioner's/appellant's property having an extent of 11.114 cents which described in the plaint schedule property for a consideration of Rs.30,000/- per cent. According to the plaintiff, the appellant/defendant has received a sum of Rs.1,70,000/- being the advance and the period fixed to comply the transaction was 6 months. Complaining non-performance of the contract, the plaintiff filed the suit before the court below for specific performance and appellant/defendant entered appearance on 5-4-2004 in pursuance of the summons received from the court. From the records, it appears that on 5-4-2004, the case was adjourned to 26-5-2004 at the instance of the appellant for filing written statement, on which date, on behalf of the defendant submitted that written statement was being filed and hence, accordingly, the case was again adjourned to 30-6-2004 for raising issues. On 30-6-2004, the trial court found that no written statement was filed as submitted and the defendant was set ex parte and for remitting balance court fee, the case was adjourned to 3-7-2004. But at the request of the plaintiff, the case was again adjourned to 7-7-2004. On 7-7-2004, the balance

court fee was paid and the plaintiff filed ex parte proof affidavit and marked Exts.A1 to A4 and thus the suit was decreed ex parte on 7-7-2004.

4. Subsequently, on 16-9-2004, the above mentioned three petitions, viz., I.A.1521/2004 to receive written statement, I.A. 1522/2004 to condone the delay of 40 days in approaching the court for filing the petition setting aside the ex parte decree, and finally I.A.1523/2004 with a prayer to set aside the ex parte decree dated 7-7-2004. The explanation offered by the appellant/defendant in the affidavit in support of I.A.1522/2004 for condonation of delay was not satisfactory according to the court below. In the impugned order, the court below has stated that apart from the bald averments that the defendant's father was laid up and the petitioner had to spent time at the bed side of his father in the hospital as well as in the home, no details are given. Even the name of the hospital and the date of the admission of the defendant's father etc. are not stated. The trial court further found that the defendant had received notice on 11-8-2004 from the counsel for the plaintiff about the deposit of balance sale consideration, even then above mentioned petitions were filed

only on 16-9-2004, after the expiry of more than a month's time after the date of receipt of the above mentioned notice. Thus according to the trial court, the reasons stated in the petition are not sufficient to condone the delay and to set aside the ex parte decree. According to the court below, the approach of the defendant and the belated filing of petition to set aside the ex parte decree and to receive written statement etc. are with a view to defeat the purpose behind the amendment to C.P.C and thus the court below dismissed all the petitions filed by the appellant/defendant by the above order. It is the above finding and order of the court below impugned in this appeal.

5. From the proceedings of the court below, and as per the materials available on records, it can be seen that even though there was failure on the part of the appellant/defendant to defend the case in time, he had approached the court by filing the above petitions without much delay and the delay was only 40 days in preferring those petitions. In support of the condonation of delay of 40 days in preferring the petition to set aside the ex parte decree, an affidavit was filed , wherein it was specifically stated that he could not appear before the court or could not take steps

for filing the written statement since his father had happened to fall from the fishing prawn breeder structure on 5-5-2004 and he was under treatment and it was the duty of the appellant/defendant to look after his father. Thus according to the appellant, the court below has erroneously dismissed all the petitions filed by him and therefore the order is illegal and arbitrary.

6. Along with the present memorandum of appeal, the appellant has produced annexure A1 certificate dated 5-8-2004 showing the injury sustained by the father of the appellant and the treatment given to him and annexure A1 document shows that the petitioner's care and attention was required, especially, when the injured was an old man aged 72 years.

7. In support of the petition to condone the delay of filing the present appeal, the petitioner has filed an affidavit dated 7-4-2006 in which he had controverted the plaint averment and also explained the delay occurred in preferring the appeal. In paragraph 3 of the affidavit, it is stated that the counsel who was appearing for the defendant in the court below has not informed the dismissal of the I.A. which was filed to set aside the ex parte

decree and it is also stated that the defendant was also laid up due to the injury sustained by him in the work site. It is also stated in the affidavit that whenever he contacted his counsel over telephone, he was told that the case was pending before the court and he will be informed as and when his personal presence were required in the proceedings. Thus it is stated that he had no other way but to believe the words of the counsel and his specific case is that his health condition and his father's fall more worsened the situation and he could not contact the counsel in person and to defend the case effectively. According to the affidavit he came to know about the impugned order only on 5-3-2006 when the advocate commissioner came to his house who was appointed from the court at the instance of the plaintiff for dividing and demarcating the plaint schedule property. Thus, according to the appellant/defendant even though he was bed ridden, he managed to contact the counsel and only then he came to know about the impugned order. Apart from the medical certificate with respect to the father of the defendant, appellant had also produced a medical certificate dated 20-3-2006 along with the memorandum of appeal which marked as annexure 3. On a

perusal of annexure A3 it can be seen that the appellant/defendant was under treatment of the doctor who issued annexure A3 certificate for the follow-up treatment pursuant to the injury sustained by the appellant during the work and the incident was taken place in September 2000. It is also stated in annexure A3 that the patient was initially admitted in the City hospital, Ernakulam, from 15-12-2004 till the date of issuing annexue A3 certificate. Thus, on the basis of annexure A1 and A3 document, the appellant/defendant submits that there was no willful laches or negligence on his part in preferring the present appeal in time before this court and therefore it is prayed that the delay may be condoned.

8. Vehemently opposing the prayer to condone the delay in preferring the appeal, the respondent/plaintiff has filed a detailed counter affidavit. In the counter affidavit it is pointed out that the advance given during the transaction was for making repayment to the loan due to Karthedam Rural Co-op. bank where the property in question was mortgaged, and he had not effected the payment and defendant was not willing to perform his part of the contract which is the subject matter of the suit. It is pointed out in the

counter affidavit that after the impugned order, the respondent/plaintiff has filed 3 petitions before the court below. I.A.739/2000 was filed with a prayer to direct the 2nd respondent to handover the original title deed which was deposited by the appellant in their bank. I.A No. 740/2005 was filed to execute and register the sale deed in favour of the plaintiff. I.A. No.741/2005 was for appointment of a commission to measure the property and to demarcate the same. It is the specific case of the respondent/plaintiff that in those applications summons was issued and the same was received by the appellant/defendant and entered appearance on 3-10-2005, which was subsequently adjourned to 20-10-2005 for filing objections and since the defendant as well as his counsel were absent, he was set ex parte. Thus it is pointed out that what stated by the appellant for condoning the delay is against the real fact. Thus according to the plaintiff, since the defendant had already entered appearance on 20-10-2005, it is not correct to say that the appellant/defendant came to know about the ex parte order only on 5-4-2006 when the advocate commissioner went to his house. According to the respondent/plaintiff, annexure A3 medical certificate is not

sufficient to explain the delay of 431 days and there was no such serious ailment so as to prevent him from contacting his counsel and taking steps from filing the appeal. It is also stated that annexure A3 certificate was issued by an E.N.T.Specialist and therefore all the claims based upon annexure A3 certificate are liable to be rejected. It is also stated that the I.A.s filed by the appellant before the court below are liable to be dismissed as the second defendant was not arrayed as necessary party therein. It is further stated in the affidavit that he had not signed the document and the same is a concocted document only for the purpose of creating evidence for the purpose of the case. It is also stated in the counter affidavit that the respondent/appellant had remitted a sum of Rs.1,95,114/- to the 2nd defendant and got the mortgage release vide release deed No.656/2005 of Njarakkal sub Registrar's Office. Thus according to the respondent/plaintiff, he had paid off all the money as per the terms of the agreement and he had incurred heavy expenses towards the transaction as well as towards the conduct of the case and hence, it is prayed that this Court at this stage may not disturb the decree passed by the court below and therefore prayed to dismiss the petition for

condonation of delay in filing the appeal and also prayed for dismissal of the appeal.

9. Denying the averments and contentions raised in the counter affidavit in the I.A for condonation of delay, the appellant/petitioner has filed a reply affidavit and produced anenxure A4 document which he claimed as the agreement for sale, which is the subject matter of the suit. In the said reply affidavit, the appellant had stated that relevant consideration was fixed at the rate of Rs.1,30,000/- per cent. But in the plaint as well as in the counter affidavit in the petition for condonation of delay, the sale consideration is shown as only Rs.30,000/- per cent. In order to establish the above claim, he produced annexure A4 document. It is further stated that annexure A4 agreement was cancelled as per annexure 2 document which was produced along with the memorandum of appeal. Thus the appellant says that all transactions are vitiated and the plaintiff is not entitled to any relief in the suit if the suit is tried and disposed of on merit.

10. It is also stated in the reply affidavit that the appellant did not appear before the court below on 3-10-2005 in pursuance of any notice or summons in the I.As which were said

to have been filed by the plaintiff. It is also specifically stated that the appellant/defendant did not appear before the court below on 3-10-2005 and no time was sought for filing objection and vakalath and he had no idea about the posting of the above applications on 20-10-2005. Reiterating the stand that there was no knowledge about the passing of the impugned order, he had further stated that he was certainly unaware of the filing of petitions by the plaintiff before the court below and he had never received any summons and he did not inform about the so called summons to the counsel before the court below. It is also stated that medical certificate produced by him are genuine and repeatedly averred that the delay was occurred because of his ailment.

11. We have heard the counsel for both the appellant and respondents, extensively. Sticking to the stand of the appellant, the counsel for the appellant submitted that initially, there was only 40 days delay in filing the petition to set aside the ex parte decree and thus the delay has been properly explained and the court below ought to have accepted the explanation and allowed the petition. The counsel further submitted that even if the

explanation for the delay of 40 days was not acceptable, the court below ought to have allowed the petition on terms. It is pointed out by the counsel that, had the court below accepted the explanation regarding the delay of meagre days in preferring the petition to set aside the ex parte decree, no occasion would have arisen in filing the appeal and also the delay which was a result of subsequent event which constrained the appellant to remain in bed-rest. On the basis of annexure A3 document of medical certificate, the counsel submits that the appellant was really bedridden because of the injury sustained by him during his work at the work site. The counsel submits that in the matter of condonation of delay, court has to take a liberal approach. The counsel invited our attention to the apex court decision reported in **N.Balakrishnan v. M.Krishnamurthy** {(1998) 7 SCC 123)}in which the apex court has held:

> "It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of

> the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court".

Thus going by the decision it can be seen that the length of delay is no matter, but acceptability of the explanation is the sole criterion.

12. Another decision relied on by the counsel for the appellant which is reported in **State of Nagaland v. Lipok AO** **{**(2005) 3 SCC 752)}. In the said decision, the apex court has held that what counts is not the length of the delay but the sufficiency of the cause and shortness of the delay is one of the

circumstances to be taken into account in using the discretion. On the strength of the above decision, the counsel prays for a positive exercise of the discretion in allowing the delay condonation petition and they are prepared to abide by whatever condition deems fit and imposes by this Court.

13. On the other hand, the counsel for the respondent strenuously argued that the appellant has miserably failed to explain the delay satisfactorily. It is also argued that right from the beginning, the defendant was negligent and because of his sheer negligence, the respondent/plaintiff had incurred substantial expenses towards the conduct of the suit and other proceedings and he had also paid the entire amount covered by the contract. It is true that the plaintiff had paid an amount of Rs.1,70,000/- at the time of the agreement and subsequently, he had remitted a sum of Rs.1,95,114/- being the balance consideration and got released the mortgage property which is the plaint schedule property vide release deed No.656/2005 of Njarakkal Sub Registrar's office. While dealing with the application for condonation of delay, according to us what the court expected to examine is not only the sufficiency of the explanation offered, but

also to see how to dispense substantial justice. The offer of explanation, if it appears to be sufficient, there may not be any hesitation in condoning the delay. In the present case, as stated earlier, initially there was only 40 days while the appellant approached the court below for setting aside the ex parte decree. The delay occurred in filing the present appeal are due to the reason that the appellant has sustained injury at the work spot which resulted in his bed rest and treatment for a long period. Even then we are not fully satisfied with the explanation offered by the appellant. We are of the opinion that the explanation offered by the appellant can be accepted to condone the delay, but on terms,as the settled position is that even if the explanation is not so satisfactory, the delay can be condoned on terms.

14. At this juncture, it is worth to take note of the rival pleadings of the parties with respect to the subject matter. The parties are not strangers. They have previous acquaintance even before the date of the sale agreement. According to the appellant, there was some transaction between the parties and as per the undertaking between the appellant and the respondent, supply of cultured prawns was made over to the respondent to

the value of Rs.1,75,000/- in the course of the business. It is also claimed by the appellant that a document was executed on 8-2-2004 canceling the earlier agreement dated 25-8-2003. It is the further case of the appellant that the plaintiff with ill-motive and fraudulently filed the suit for grabbing the plaint schedule property valuing more than Rs. 15 lakhs for a paltry amount. The appellant has produced annexure A4 document for the purpose of showing that though consideration was fixed as Rs.1,30,000/- per cent, in the plaint as well as in the counter affidavit filed in this Court, it is shown as only Rs.30,000/-. According to the appellant, material alteration was made in the sale agreement. It is also stated that as per annexure A2 document, which contains the signature of both the appellant as well as the respondent on the basis of which it is claimed that the original agreement for sale was cancelled. Learned counsel appearing for the respondent has vehemently resisted the above contentions and it is submitted that all these are documents fabricated at the instance of the appellant for the purpose of this case alone. However, along with the appeal, the appellant has produced annexure A2, a document bearing the signatures of both the appellant as well as the

respondent/plaintiff, by which it is seen that the agreement dated 25-8-2003 for the sale of the property in question has been cancelled. Thus it appears that even the contents of the documents relied on by the parties to the suit are disputed and yet to be established on the basis of evidence and to find out the truth.

15. We have anxiously considered the submissions of both the counsel on their respective pleadings. However, there is no decision on merit regarding the rival pleadings and contentions of the parties. In the decision reported in **Balakrishnan's case{**(1998 7 SCC 123)}, the apex court has held :

> "The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. The time-limit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause.
>
> Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a

> legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim interest reipublicae up sit finis litium(it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time"`

16. In the light of the above decision of the Apex Court, we are of the view that let there be a quietus on the dispute on merits. If such an opportunity is given, both parties can adduce evidence and advance their pleadings effectively and to have a final settlement on the issues. We are constrained to take such an

approach considering the fact that there was an omission on the part of the court below in condoning the delay of 40 days in filing the petition to set aside the ex parte decree. Normally, the court below ought to have condoned the above delay by adopting a liberal approach or on terms. It is true that thereafter there is inordinate delay on the part of the appellant in preferring this appeal and the respondent/plaintiff has incurred heavy expense towards performing his part as per the terms of the contract and also towards the conduct of the case including commission batta and for purchase of stamp paper etc. which we cannot ignore. Therefore, according to us, the delay occurred in filing this appeal can be condoned on terms. Consequently, the dispute can be settled on merit through a thorough and fair trial, by giving opportunities to both the parties.

17. In the light of the above discussion, we condone the delay of 431 days in filing the appeal and allow the appeal on condition that the appellant shall pay a sum of Rs.50,000/- (Fifty thousand only) to the respondent within one month from today. If the above conditions are not complied with, the delay condonation petition and the appeal will stand dismissed. In the

event of compliance of the above condition and when the suit stand restored, the trial court shall expedite the trial and dispose of the suit as early as possible, at any rate, within six months otherwise the proceedings can be resumed from the stage at which it was stopped and the same shall be concluded within three months from the date of receipt of a copy of this judgment.

The Registry is directed to send a copy of this judgment to the court below forthwith.

P.R.Raman, Judge

V.K.Mohanan, Judge

kvm/-

V.K.MOHANAN, J.

No....

Judgment/Order

Dated: